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NOT FOR PUBLICATION

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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 David Miller,

10 Plaintiff,

11 v.

12 Pacific Speciality Insurance Company,

13 Defendant.  
14

No. CV-15-01442-PHX-JJT

**ORDER**

15  
16 At issue is Plaintiff David Miller's Motion to Stay Proceedings and Invoke  
17 Appraisal (Doc. 15, Mot.), to which Defendant Pacific Specialty Insurance Company  
18 filed a Response in opposition (Doc. 16, Resp.) and Plaintiff filed a Reply (Doc. 18,  
19 Reply).<sup>1</sup> For the reasons that follow, the Court grants Plaintiff's Motion to Stay  
20 Proceedings and Invoke Appraisal.

21 **I. BACKGROUND**

22 Plaintiff initiated this lawsuit in state court on June 23, 2015, (Doc. 1, Ex. A,  
23 Compl.), and Defendant removed it to this Court on July 27, 2015, (Doc. 1). On June 23,  
24 2014, Plaintiff's residence was severely damaged by fire, which was a covered loss  
25 pursuant to his insurance policy from Defendant. (Compl. ¶ 5.) After one year, Defendant  
26 had still not completed its investigation and adjustment of the loss. (Compl. ¶ 6.)

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28 <sup>1</sup> In the caption of his Complaint, Plaintiff improperly named Defendant as Pacific  
"Speciality" Insurance Company. For clarity, the Court corrects this to "Specialty" in this  
Order.

1 According to the policy, any litigation in the matter must be initiated within twelve  
 2 months of the loss. (Compl. ¶ 7.) Accordingly, Plaintiff filed this lawsuit one year later,  
 3 on June 23, 2015, raising claims against Defendant for breach of contract and bad faith.

4 At this point, significant discrepancies still exist between Plaintiff's and  
 5 Defendant's estimates of the loss. (Mot. at 1.) Due to the difference in valuations,  
 6 Plaintiff now moves for a stay of proceedings and requests an appraisal of the damage in  
 7 accordance with the policy terms. (Mot. at 1-2.)

## 8 **II. ANALYSIS**

9 Plaintiff's insurance policy contains an appraisal clause that states:

10 If you and we fail to agree as to the actual cash value or the amount of loss,  
 11 then, on the written request of either, each shall select a competent and  
 12 disinterested appraiser and notify the other of the appraiser selected within  
 13 twenty days of the request. Where the request is accepted, the appraisers  
 shall first select a competent and disinterested umpire . . . . Dated this  
 7th day of June, 2016.

14 (Doc. 17-1.) Arizona law treats appraisal requests pursuant to a contractual provision the  
 15 same as arbitration requests. *Meineke v. Twin City Fire Ins. Co.*, 892 P.2d 1365, 1369  
 16 (Ariz. Ct. App. 1994); *Hanson v. Commercial Union Ins. Co.*, 723 P.2d 101, 103 (Ariz.  
 17 Ct. App. 1986). Thus, as with arbitration clauses under the Federal Arbitration Act  
 18 (FAA), appraisal clauses are "valid, irrevocable and enforceable, save upon such grounds  
 19 as exist at law or in equity for the revocation of any contract." *Ori v. Am. Family Mut.*  
 20 *Ins. Co.*, No. CV-2005-697-PHX-ROS, 2005 WL 3079044, at \*2 (D. Ariz. Nov. 15,  
 21 2005). For example, waiver of an appraisal clause is a possible defense. *See Moses H.*  
 22 *Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25 (1983).

23 Defendant offers three reasons for the Court to refuse to enforce the appraisal  
 24 clause with respect to Plaintiff's claim: (1) Appraisal requires acceptance by the other  
 25 party, (2) the appraisal request is barred by waiver, and (3) the demand for appraisal was  
 26 untimely. (Resp. at 1-2.) The Court examines these in turn.

1           **A.     No Acceptance Requirement to Initiate Appraisal**

2           Defendant argues that without acceptance and agreement of both parties, appraisal  
3 is not available. (Resp. at 1.) “[A]ny doubts concerning the scope of [appraisable] issues  
4 should be resolved in favor of [appraisal], whether the problem at hand is the  
5 construction of the contract language itself or an allegation of waiver, delay, or a like  
6 defense to [appraisability].” *Moses*, 461 U.S. at 24-25.

7           Here, the insurance policy, as required under Arizona law, provides for appraisal  
8 “on the written request of either” where the parties disagree as to the amount of loss. *See*  
9 A.R.S. § 20-1503. Defendant argues it must first accept and agree to any request for  
10 appraisal. The Court disagrees. The policy states that either party may select a competent  
11 and disinterested appraiser when there is a disagreement as to the value of the loss.  
12 Further, a requirement that an opposing party must accept any request for appraisal would  
13 obstruct the purpose and effectiveness of the appraisal clause. *See Gates v. Ariz. Brewing*  
14 *Co.*, 95 P.2d 49, 50 (Ariz. 1939) (stating the primary purpose of [appraisal] is to obtain an  
15 inexpensive and speedy final disposition on the matter involved). While the Court does  
16 not agree with Defendant’s proffered interpretation of its policy, even if the Court were to  
17 find ambiguity in the policy, it would construe the language in favor of appraisal. *See*  
18 *Moses*, 461 U.S. at 24-25.

19           The Court finds Plaintiff requested an appraisal in accordance with the policy  
20 terms. Therefore, Defendant’s argument for mutual acceptance of appraisal fails.

21           **B.     No Waiver of Appraisal Right**

22           Defendant argues that Plaintiff waived his right to appraisal by filing this lawsuit.  
23 (Resp. at 2.) Arizona law has established that a party to a contract may waive its right to  
24 enforce an arbitration or appraisal agreement by its conduct. *See Forrest City Dillon, Inc.*  
25 *v. Superior Court*, 675 P.2d 297, 299 (Ariz. Ct. App. 1984). However, because public  
26 policy favors arbitration and appraisal, Arizona courts generally do not favor waivers of  
27 arbitration or appraisal agreements. *See Meineke*, 892 P.2d at 1370 (Ariz. Ct. App. 1994)  
28 (citing *U.S. Insulation v. Hilro Constr. Co.*, 705 P.2d 490, 498 (Ariz. Ct. App. 1985)). A

1 party waives an appraisal clause with conduct that is “inconsistent with the use of the  
2 [appraisal] remedy; in other words, conduct that shows an intent not to [appraise].” *Id.*  
3 (citing *EFC Dev. Corp. v. F.F. Baugh Plumbing & Heating, Inc.*, 540 P.2d 185, 188  
4 (Ariz. Ct. App. 1975)). Inconsistency is usually found from “such conduct as preventing  
5 [appraisal], making [appraisal] impossible, proceeding at all times in disregard of the  
6 [appraisal] clause, expressly agreeing to waive [appraisal], or unreasonable delay.” *EFC*  
7 *Dev. Corp.*, 540 P.2d at 188.

8 Here, Plaintiff’s conduct is not inconsistent with the use of the appraisal remedy.  
9 Plaintiff filed this lawsuit before requesting appraisal, but only to comply with the policy  
10 terms that require the initiation of litigation within twelve months of the date of loss.  
11 (Mot. at 2.) While Defendant claims, citing *Meineke*, that the filing of a lawsuit indicates  
12 a clear repudiation of the right to have an appraisal, (Resp. at 2), the facts alleged by  
13 Plaintiff support a different inference. Since Defendant had not yet completed the  
14 adjustment of the loss, the need for Plaintiff to request an appraisal was not apparent.  
15 (See Reply at 2.) The approach of the twelve-month time limit imposed by the policy,  
16 however, made Plaintiff’s initiation of this lawsuit reasonable.

17 The Court finds that Plaintiff did not waive his right to invoke the appraisal clause  
18 by filing this lawsuit. Thus, Defendant’s argument for waiver fails.

19 **C. Demand for Appraisal Was Not Unreasonably Delayed**

20 Defendant argues that Plaintiff’s demand for appraisal was untimely, since he  
21 waited for over a year to make the request. (Resp. at 2.) However, untimeliness by itself  
22 does not rise to repudiation by unreasonable delay. *City of Cottonwood v. James L. Fann*  
23 *Contracting*, 877 P.2d 284, 290 (Ariz. Ct. App. 1994). In order to show unreasonable  
24 delay, Defendant must show “clear evidence of 1) prejudice suffered by the other party  
25 and 2) a demand for [appraisal] so egregiously untimely and inconsistent with an intent to  
26 assert the right to [appraisal] that an intentional relinquishment can be inferred.” *Meineke*,  
27 892 P.2d at 1370.

1 Here, Plaintiff's request for appraisal was not unreasonably delayed. Neither party  
2 will be substantially prejudiced by engaging in the appraisal process at this juncture. *See*  
3 *Lake Commc'ns, Inc. v. ICC Corp.*, 738 F.2d 1473, 1477 (9th Cir. 1984) (noting no  
4 prejudice where the progress of the litigation was limited). Defendant will not be  
5 subjected to unexpected expenditures of time, duplication of effort, or advantage to the  
6 other party—nor has Defendant suggested any possibility of prejudice in its Response.  
7 Defendant's only argument is that the request came too late. (Resp. at 2.) While  
8 Plaintiff's request for appraisal may be viewed as somewhat tardy in the context of this  
9 litigation, it is not egregiously untimely. Defendant has yet to complete the adjustment of  
10 the loss, the home has yet to be repaired, and there has been no substantial discovery thus  
11 far. Requesting appraisal at this point is not unreasonable and will likely benefit both  
12 parties and the Court in resolving this matter more efficiently. Particularly in view of the  
13 policy favoring appraisal, the Court concludes that Plaintiff did not waive his right to  
14 invoke the appraisal clause under his policy.

### 15 C. Stay of Proceedings

16 Plaintiff asks the Court to stay these proceedings pending appraisal. (Mot. at 1-2.)  
17 In evaluating such a request, the Court considers the management of its docket and  
18 judicial economy as well as the predominance of the appraisable claims and the merit of  
19 the non-appraisable claims. *See Ori*, 2005 WL 3079044, at \*4 (citing *F.D. Imp. & Exp. v.*  
20 *M/V Reefer Sun*, 248 F. Supp. 2d 240, 251 (S.D.N.Y. 2002)).

21 Here, the appraisable claim, for compensation under the policy for damage  
22 resulting from a covered event, predominates this lawsuit and the bad faith and breach of  
23 contract claim depend on it. The Court thus finds that staying the non-appraisable claims  
24 is the most efficient way to manage this litigation.

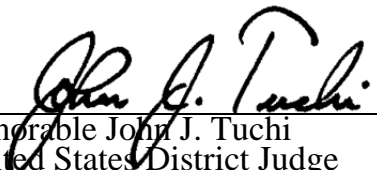
### 25 III. CONCLUSION

26 Each of Defendant's arguments in its Opposition fails. The Court finds that  
27 Plaintiff requested appraisal according to the policy terms. Additionally, this request was  
28 not unreasonably delayed and does not prejudice Defendant.

1 IT IS THEREFORE ORDERED granting Plaintiff's Motion to Compel Appraisal  
2 and to Stay Proceedings (Doc. 15) as detailed in this Order. The parties shall proceed  
3 with appraisal under the terms of the policy.

4 IT IS FURTHER ORDERED staying these proceedings pending the results of the  
5 appraisal. The parties shall advise the Court within 14 days of the completion of the  
6 appraisal process whether the parties have resolved this matter in full or whether the  
7 Court should lift the stay and this matter should proceed.

8 Dated this 8<sup>th</sup> day of June, 2016.

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11 Honorable John J. Tuchi  
United States District Judge  
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